IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 10-0029

Terry N. Trieweiler
TRIEWEILER LAW FIRM
309 Wisconsin
P.O. Box 5509
Whitefish, MT 59937
(406) 862-4597
(406) 862-4685 fax
Email: ttrieweiler@centurytel.net

Bob Germany
PITTMAN, GERMANY, ROBERTS
& WELSH, LLP
410 South President Street
Jackson, MS 39201
(602) 948-6200
(601) 948-6187 fax
Email: rgg@pgrwlaw.com

James T. Towe
TOWE LAW OFFICES
502 West Spruce
P.O. Box 7826
Missoula, MT 59807-7826
(406) 829-1669
(406) 327-1518 fax
Email: jamiet@montanadsl.net

Bart Valad
VALAD & VECCHIONE, PLLC
3863 Plaza Drive
Fairfax, VA 22030
(703) 352-4800
(703) 352-4820 fax
Email: bvalad@valadlaw.com

NOVARTIS PHARMACEUTICALS CORPORATION Appellant/Cross Appellee, vs. PEGGY STEVENS Appellee/Cross Appellant.	APPELLEE'S MOTION TO STRIKE REPLY BRIEF OR IN THE ALTERNATIVE PERMIT RESPONSE OR SCHEDULE ORAL ARGUMENT

The Appellee/Cross Appellant, Peggy Stevens, moves the court for an order striking from the Appellant's Reply Brief filed on July 1, 2010, part IC beginning on the bottom third of p. 9 to and including all of p. 16.

In the alternative, Appellee moves the court to permit that a response to the newly raised argument be included in the Appellee/Cross Appellant's Reply Brief or to schedule this matter for oral argument limited to the issue of the statute of limitations so that a response can be made.

The motion is made for the reason that the part of Appellant's Reply Brief at issue raises a new issue and argument not included in its opening brief on a dispositive issue to which the Appellee has had no opportunity to respond.

Counsel for the Appellant has been consulted and objects to this motion.

Procedural Background

On January 13, 2009, the Appellee/Cross Appellant, Peggy Stevens, filed an amended complaint in district court in which she substituted Novartis Pharmaceuticals Corporation for a fictitiously-named John Doe defendant. (Doc. 58, ¶20)

Notwithstanding the district court's April 7, 2009, order denying NPC's motion to dismiss based on the statute of limitations (Doc. 125, pp. 6, 7, and 8), NPC raised the issue again prior to trial by way of a motion for summary judgment. (Doc. 300) It cited no additional authority other than a contrary district court decision from a different venue. In response, based on additional information gathered after NPC's joinder, Peggy Stevens re-cited those authorities on which the district court originally relied and provided the additional argument that the statute of limitations for claims against NPC was tolled during the pendency of a class action in federal district court in

which Peggy Stevens was a putative class member and which claimed relief identical to that relief claimed in this case. National authority was provided in support of that argument. (Doc. 346, pp. 16-19) NPC filed a 4-page reply to that argument including primary authority from three different state jurisdictions and several federal court decisions speculating on what other states might do. (Doc. 374, pp. 9-13)

On October 8, 2009, the district court denied NPC's motion for summary judgment, explaining that no new arguments had been raised by NPC and that its motion should therefore be denied. (Doc. 387, pp. 6 and 9)

Tolling based on the national class action was also raised during settlement of instructions when plaintiff's attorney objected to NPC's instructions 39, 40, 41, 42, and 43, (which would have simply instructed the jury that if Peggy Stevens knew NPC's name within 3 years following her injury, her claim was barred) because the appropriateness of those instructions had been addressed by the court's ruling and because based on tolling by the prior class action the statute of limitations issue was a question of law. (Tr. 1782:21-1785:23) It was following that argument that the court declined to give NPC's statute of limitation instructions. (Tr. 1784:24-1786:3) It was, therefore, incumbent on NPC to raise the tolling issue in its opening brief as part of its statute of limitations argument. It did not do so. Instead it waited until it assumed Peggy Stevens would be unable to respond.

In response to NPC's initial brief, the Appellee objected to later consideration of

the argument and did her best to respond to the argument NPA had made in the district court.

Unfortunately, NPC saved its entire class action tolling argument for its reply brief, where the largest portion of its brief was spent addressing that issue. This does not include the 41 authorities and characterization of their holdings that it added by way of "Appendix 2", only 3 of which were cited to the district court, and the rest of which Peggy Stevens has never had an opportunity to discuss and distinguish to this court.

That portion of NPC's "reply" which addresses class action tolling is attached hereto as Exh. No. 1. Its appendix adds another 1,200 words to an argument which already approximated the increased word limit NPC was allowed by this court. The discussion is generally filled with misleading argument, mischaracterized case law, misrepresentation regarding the national status of this issue, and numerous arguments not previously made in District Court, which could not have been anticipated by the Appellee.

In the event the additional discussion is not stricken, Peggy Stevens proposes that she be allowed to file the response which is attached hereto as Exh. No. 2. It is included in the reply brief already submitted to this court on July 15, 2010, the date on which it was due. In the event that the objectionable portion of NPC's reply is stricken or her motion is otherwise denied, Appellee proposes that she be allowed to file a

substitute reply brief with the responsive material stricken. However, in the interest of expediting the appeal, this reply was provided pending the court's disposition of Peggy Stevens' motion.

Authorities

The Montana Supreme Court "will not address the merits of an issue presented for the first time in a reply brief." *In re Estate Bovey*, 2006 MT 46, ¶ 11, 331 Mont. 254, 132 P.3d 510 (citing *Pengra v. State*, 2000 MT 291, ¶ 13, 302 Mont. 276, 14 P.3d 499). *See also, City of Billings v. Mouat*, 2008 MT 66, ¶ 15, 342 Mont. 79, 180 P.3d 1121 ("M. R. App. P. 12(3) prohibits an appellant from raising new issues in the reply brief").

See also *State v. Sattler*, 1998 MT 57, ¶ 47, 288 Mont. 79, 956 P.2d 54 (Court does not address legal theories raised for the first time in a reply brief because "[t]o do so would tilt the balance in a case in favor of the party who gets the final word in presenting its arguments to this Court").

In *In re Urethane Antitrust Litig.*, 663 F. Supp. 2d 1067, 1083, n. 11(D. Kan. 2009) cited on p. 2 of NPC's reply appendix, the district court with a nearly identical situation. It held as follows:

> In their original brief, defendants stated that they did not move to dismiss plaintiffs' 1999-2004 claims under Wisconsin law as time-barred in light of Wisconsin's six-year statute of limitations for antitrust actions. See Wis. Stat. § 133.18(2). In their response, plaintiffs noted that concession and the lack of any mention of the 1994-98 claims under Wisconsin law.

> Defendants then argued in a footnote in their reply brief that without tolling from the class action filing, any pre-2002 Wisconsin claims would also be time-barred. The Court rejects defendants' argument for two reasons. . . Second, defendants may not seek dismissal of particular claims for the first time in a reply brief. *See, e.g., U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 2008 U.S. Dist. LEXIS 59737, 2008 WL 3077074, at *9 n.7 (D. Kan. Aug. 4, 2008) (court will not consider argument raised for first time in reply brief) (citing *Minshall v. McGraw Hill Broadcasting Co.*, 323 F.3d 1273, 1288 (10th Cir. 2003)). Accordingly, the Court does not consider whether Wisconsin recognizes cross-jurisdictional class-action tolling.

The Ninth Circuit is in accord. See *Ellett v. Sykora*, 90 Fed. Appx. 493, 495-496 (9th Cir. 2003); *Pease v. United States*, 1999 U.S. App. LEXIS 23678 (9th Cir. 1999); and *Gomez v. Castro*, 47 Fed. Appx. 821, 822, n. 2 (9th Cir. 2002).

CONCLUSION

Resolution of a dispositive issue in a case of this magnitude should not be based on surprise or ambush. Appellee simply requests a fair opportunity to respond.

DATED this 14th day of July, 2010.

By: /s/ Terry N. Trieweiler
Terry N. Trieweiler
Attorney for Appellee/Cross Appellant

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of July, 2010, a true and exact copy of the foregoing document was served on the Appellant by mailing a copy, postage pre-paid to:

Joe G. Hollingsworth, Esq.
Katharine R. Latimer, Esq.
HOLLINGSWORTH LLp
1350 I St., N.W.
Washington, DC 20005

W. Carl Mendenhall, Esq.
WORDEN THANE P.C.
P.O. BOX 4747
Missoula, MT 59806-4747

Dated this 14th day of July, 2010.

Karen R. Weaver

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 1,249 words, including all text, excluding certificate of service and certificate of compliance.

Dated this 14th day of July, 2010.

Karen R. Weaver